SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAR 19 1960

IN THE

Supreme Court of the United States

October Term 1959

No. 1080

THE FLUOR CORPORATION, LTD. and COMMERCIAL INSURANCE COMPANY OF NEWARK, NEW JERSEY,
Petitioners,

versus

KENNETH H. CUNNYNGHAM,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

ROBERT B. NEBLETT, JR.
602 Murray Street
Alexandria, Louisiana 71301

OF COUNSEL:
LEONARD FUHRER
602 Murray Street
Alexandria, Louisiana 71301

HAUSER DIV., McMULLEN PTG. CO., "Legal Printers", 441 Gravier St., N. O., La.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1969

No. 1080

THE FLUOR CORPORATION, LTD. and
COMMERCIAL INSURANCE COMPANY OF
NEWARK, NEW JERSEY,
Petitioners,

versus

KENNETH H. CUNNYNGHAM,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Kenneth H. Cunnyngham, respondent herein, received notice on February 28, 1969 that petitioner had applied to this Honorable Court for a writ of certiorari. Respondent respectfully opposes the granting of such writ for the following reasons:

1) The legal principles alleged to be involved are well settled and were correctly applied below.

2) No special or important reasons ordinarily considered as governing review by this Honorable Court on certiorari exist in the instant case.

3) The legal conclusions of the Deputy Commissioner were erroneous and, therefore, were correctly reversed.

ARGUMENT

MAY IT PLEASE THE COURT:

In a strained effort to attract this Court's attention, petitioners fancy some sort of conflict between the standards for determining total permanent disability in the First and Fifth Circuits. Petitioners quote some language from the *District Court's* opinion pertaining to ability to compete in the labor market and to be compensated at the previous wage scale.[1] Petitioners then proceed to imply that, since the Court of Appeals affirmed the District Court, it was perforce adopting the reasons of the District Court.

As readily appears from the two Court of Appeals decisions, petitioner is clearly wrong in this contention.

---

[1]Respondent does not concede that the District Court was wrong in its decision; on the contrary, respondent believes that the District Court's decision was well-reasoned and amply supported in the jurisprudence. Respondent only says, for present purposes, that the correctness of those portions of its opinion, complained of by petitioners, is not at issue.

The Court of Appeals reversed on the first appeal holding that the Deputy Commissioner's order was unsupported by the evidence. Reviewing courts clearly have the authority to reverse compensation orders which are contrary to the evidence, and petitioner does not contend otherwise. No other legal principle (germane to this proceeding) was involved in the first Court of Appeals decision.

What transpired thereafter? The case was remanded to the Commissioner, the entire record of the first hearing was re-introduced, and, in addition, there was evidence about a welding test taken by respondent which he failed to pass.[2] Thereupon, the Deputy Commissioner, ignoring the first Court of Appeals decision, persisted in denying compensation on the incredibly erroneous theory that, since respondent failed the welding test due to lack of welding skill and *not* due to his injuries, he was not entitled to compensation. We shall comment further upon the error of the Deputy Commissioner's approach below. Sufficient here to note that the import of the evidence on the second hear-

---

[2]No one, except petitioners, has suggested that respondent failed the welding test because he did not try to pass it. The Deputy Commissioner, commenting on this test, said merely that respondent "failed to demonstrate sufficient knowledge of the work to warrant being hired". Commenting on the welding test, the District Court said, "A review of the testimony does not persuade me that respondent and intervenors are correct" in their contention that Cunnyngham did not try hard enough to pass the welding test. The Court of Appeals commented generally that the new evidence admitted on second hearing below was "carefully considered" and that it did not "warrant a departure from our prior holding". Thus, far from supporting petitioners' contention, the record actually militates against them.

ing before the Deputy Commissioner favors respondent; it demonstrates even more clearly that he lacks the skill to obtain work supposedly available to him even with his physical limitations.

Thence, the case went to the District Court which reversed the Deputy Commissioner, holding, inter alia, that nothing had changed since the Court of Appeals first reversed the Deputy Commissioner, and that, indeed, respondent's situation had actually worsened with respect to each of the four factors mentioned by the Court of Appeals — age, education, industrial history and the availability of work which respondent can do.

Thence, the case went back to the Court of Appeals which stated that the "law of the case doctrine" would apply unless the new evidence "on the second hearing was so different as to warrant a different result or . . . the former decision . . . was clearly erroneous and works a manifest injustice", and went on to hold (403 F.2d 223, 224):

> We have carefully considered the evidence offered on the subsequent hearing of this matter. It does not warrant a departure from our prior holding. Nor do we believe that our prior holding was clearly erroneous or that it works a manifest injustice.
>
> Affirmed.

Thus, regardless of the correctness of the District

Court's reasons for decision, the Court of Appeals obviously did not adopt them as its own. It merely held, in effect, that the "welding test" evidence did not warrant a departure from its prior holding — which is understandable in view of the fact that the "welding test" evidence actually favored respondent Cunnyngham. No new, unusual, onerous, erroneous standard of disability was created by the Court of Appeals in this case; no conflict between the circuits was created.

No denial of constitutional due process is alleged by petitioners.

On the matter of the Deputy Commissioner's legal conclusions, they are so patently erroneous as to be almost ludicrous. It should be borne in mind that the Deputy Commissioner made no finding of fact to the effect that respondent did not try to pass his welding test; such a finding of fact might be binding upon reviewing courts, had it been made. However, the Deputy Commissioner only concluded that respondent "failed to demonstrate sufficient knowledge of the work to warrant being hired". The implication of such a finding is that respondent *lacked* the requisite skill and knowledge, not that he purposely failed the test.[3]

---

[3]Indeed, even if repsondent had passed the welding test, this would not amount to proof that he could have obtained employment with the company which gave the test — a company situated 200 miles from respondent's home. The manager of the company stated that, not only must a potential employee pass a welding test, he must also pass a personal inquiry and a physical examination. There was no showing whatsoever that respondent could have passed the personal inquiry or physical examination so as to qualify for the special jobs which this

Accordingly, when the Deputy Commissioner denied compensation for the reason that it was respondent's lack of skill, not his physical handicaps, which prevented his employment, he committed a pure error of law; he was not making a finding of fact, binding upon reviewing courts. He was in effect saying, "Mr. Cunnyngham, you have failed your welding test because you do not know how to weld well enough, not because you are seriously crippled, and I therefore deny you compensation."

The fallacy of the Deputy Commissioner's legal test is patent. Logically, it is no less absurd than a similar conclusion in the following hypothetical case: Suppose petitioners, instead of procuring a New Orleans machine shop to offer a welding job to a qualified crippled man, had gotten a New Orleans university to offer a job to a qualified crippled man to be a chemistry professor; then, had Mr. Cunnyngham gone out to the university and failed to pass a pre-employment interview by the head of the chemistry department, it could always be said that it was not because Mr. Cunnyngham was crippled that he failed to get the job; it was only because, as the Deputy Commissioner put it, he "failed to demonstrate sufficient knowledge of the work to warrant being hired.

If this sort of "test" be countenanced by the courts,

---

company had open for the handicapped. The manager also said "we're not running any welding school out there", meaning that, unless the applicant demonstrates his skill on the test, he will not be given a job for the purpose of improving his skill through working.

the compensation laws would become meaningless. All an employer or insurer would have to do to evade compensation liability to a severely disabled employee would be to find some potential employer who would be willing to hire an otherwise qualified man with the particular handicaps involved. Then, it would make no difference whether the man qualified; it could always be said that it was not the man's physical handicaps which prevented his being hired — it was merely that he lacked the necessary skill, knowledge or training. And this is, in effect, what the Deputy Commissioner has held in the instant case. The reviewing courts were completely justified in reversing such a holding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Robert B. Neblett, Jr.

Of Counsel:

Leonard Fuhrer

CERTIFICATE

STATE OF LOUISIANA)
)
PARISH OF RAPIDES)

ROBERT B. NEBLETT, JR., being duly sworn, deposed and said: That he is a duly qualified member of the Bar of the Supreme Court of the United States; that he has forwarded a copy of the foregoing brief in opposition to the petition for certiorari to the Fluor Corporation, Ltd. and Commercial Insurance Company of Newark, New Jersey, by depositing a copy thereof in the United States mail, postage prepaid, addressed to their counsel of record at their last known address in New Orleans, Louisiana, this date.

Robert B. Neblett, Jr.

Sworn to and subscribed before me, Notary, this 17th day of March, 1969.

Notary Public